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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 77/2017 concerning Beatriz del Rosario Rivero Martínez (Colombia)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 29 May 2017 the Working Group transmitted to the Government of Colombia a communication concerning Beatriz del Rosario Rivero Martínez, requesting that it respond by 28 July 2017. The Government has not replied to that communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Beatriz del Rosario Rivero Martínez (Ms. Rivero), a Colombian national with identity card No. 45.423.967, is a lawyer and a former judge. She lives in the city of Cartagena, in the department of Bolívar, Colombia, where she is currently serving a custodial sentence under house arrest.

5. Ms. Rivero began her legal career in 1987, working first as a judicial assistant and then as a court clerk. On 28 February 1990, she became a judge. By 2001, she was combining her judicial work with university teaching and with trade union activities as a member of the National Association of Officials and Employees of the Judiciary.

Initial arrest and detention

6. According to the information received, Ms. Rivero was first deprived of her liberty on 29 January 2001 at the headquarters of the municipal courts of Cartagena de Indias by order of the Office of Prosecutor No. 4, assigned to the High Court of Cartagena. Security officers were reportedly waiting for her outside her office. When she emerged, the arrest was carried out on a public street.

7. The source indicates that the media had been summoned in advance to cover the moment of her arrest, which was reported as a case of judicial corruption, although it allegedly involved a dispute over the application of constitutional and international human rights standards.

8. The judge was reportedly transferred to an ordinary prison — San Diego prison in Cartagena — where she was placed with a number of women that she had previously sentenced. On the same date, 29 January 2001, Ms. Rivero was suspended from her post as an additional penalty.

Legal framework

9. According to the source, the above-mentioned arrest forms part of a case against Ms. Rivero for the alleged commission of the offence of perverting the course of justice. She has also been detained on other occasions and other proceedings have been brought against her. Since 1998, criminal proceedings have been brought against Ms. Rivero a number of times. As a result, and as described in the present communication, she has been placed in various forms of detention, in various circumstances, since 2001.

10. The information received indicates that Ms. Rivero's case relates to a dispute over whether habeas corpus and other *tutela* (application for protection of constitutional rights) proceedings are admissible under laws and judgments intended to protect human rights. In that regard, the source notes that, under the Code of Criminal Procedure, the remedy of habeas corpus may not be invoked in cases involving the deprivation of liberty. Consequently, two jurisprudential approaches concerning the application of international standards relating to *tutela* proceedings in Colombia have emerged. In some cases, judges applied the law with the understanding that the application of Colombian provisions on habeas corpus entailed the application of the rules of international human rights law. In other cases, according to the source, judges rejected the use of habeas corpus and *tutela* writs to challenge judicial decisions in order to avoid being prosecuted for the offence of perverting the course of justice. The former group reportedly follow the jurisprudence of the Constitutional Court, while the latter act in accordance with the decisions of the Supreme Court.

Case of the Directorate of National Taxes and Customs

11. According to the source, the case that led to Ms. Rivero's initial arrest began with the seizure of goods in Colombia's territorial waters by the Directorate of National Taxes

and Customs and the Colombian Navy on 9 May 2000. Eight months after the seizure, the merchants concerned filed a *tutela* action that was heard by the then judge Rivero. On 10 January 2001, the judge granted the *tutela* application on the grounds that the case constituted a violation of due process and property rights. The then director of the Directorate of National Taxes and Customs filed a criminal and disciplinary complaint against Ms. Rivero.

12. As stated above, Ms. Rivero was arrested on 29 January 2001, 19 days after she had issued the judgment. According to the source, the prosecution initially charged her with perverting the course of justice and aiding smuggling, but it subsequently dropped the latter charge. On 5 June 2001, at the request of Ms. Rivero, the Office of the Prosecutor reportedly granted her provisional release. On 7 June 2001, however, the same Office filed charges against her and revoked that privilege, ordering her to be placed under house arrest.

13. During the trial phase, Ms. Rivero reportedly petitioned the High Court of Cartagena to overturn the order placing her under pretrial house arrest. On 25 October 2002, however, the Criminal Chamber of the High Court of Cartagena refused to overturn the order. The detained defendant challenged this decision by filing an application for review or, in the alternative, appeal. On 28 February 2003, the Court reaffirmed its decision and ordered Ms. Rivero to be detained in the district prison of San Diego de Cartagena. These decisions were upheld by the Supreme Court on 6 August 2003.

14. The source states that, on 19 November 2003, Ms. Rivero filed a petition to be granted provisional release on the grounds that she had been detained for over 36 months, which, under articles 365 (2) of the Code of Criminal Procedure and article 64 of the Criminal Code, is the minimum penalty that can be imposed for the offence of perverting the course of justice. On 26 November 2003, the High Court of Cartagena rejected her petition for provisional release, arguing that her deprivation of liberty had supposedly not exceeded three fifths of the sentence she would have received if she had been convicted (3 to 8 years' imprisonment). The Court allegedly considered her position as a judge to be an aggravating circumstance, although that circumstance was not mentioned by the prosecutor in the charge. The Court found that the maximum penalty (8 years) should be used as a benchmark.

15. The Court's decision was reportedly appealed by Ms. Rivero. On 5 February 2004, the Supreme Court reportedly ruled on the appeal in favour of Ms. Rivero on the grounds that the lower court's decision violated the most-favourable-law principle, in accordance with which it was required to use the lightest sentence as a benchmark.

16. On 29 July 2004, according to the information received, the High Court of the Judicial District of Cartagena sentenced Ms. Rivero to 48 months' imprisonment for the offence of perverting the course of justice.

Trials for other tutela and habeas corpus decisions

17. The source states that on 11 February 1999 the Office of the Prosecutor assigned to the High Court of Cartagena ordered an investigation to be opened against Ms. Rivero for the offence of perverting the course of justice. This action was taken allegedly because she had granted a habeas corpus application sought by a person whose deprivation of liberty had exceeded the legal time limit without the investigation having resulted in the filing of charges. On 10 October 2000 the judge was ordered to be placed in pretrial detention; on 19 June 2001 she was placed under house arrest as an alternative measure.

18. The source states that on 19 November 2001 Ms. Rivero was charged with perverting the course of justice and ordered to be placed in pretrial detention. Following an appeal, the pretrial detention order was revoked, but on 3 January 2002 she was again placed under house arrest. However, the decision to place her under house arrest was reportedly appealed on 6 August 2002, and on 30 May 2003 the High Court of Cartagena ordered that she be placed in pretrial detention in a detention centre.

19. The source reports that, subsequently, on 30 June 2005, the Office of Prosecutor No. 5 assigned to the High Court of Cartagena filed charges against Ms. Rivero for the offence of perverting the course of justice. According to the source, this action was taken because,

upon admitting a *tutela* application on 21 December 2000, she had allegedly ordered the provisional stay of a decision by the Office of the Municipal Comptroller of Bolívar to sanction the manager of the Bolívar Institute of Sport and Recreation with an immediate suspension from office.

20. The source informed the Working Group that, on 22 November 2005, during the preparatory hearing conducted by the Criminal Chamber of the High Court of Cartagena, Ms. Rivero submitted a motion for consolidation of four cases brought against her before that court, all of which related to habeas corpus or *tutela* applications on which she had ruled in favour of detained persons. On 4 December 2006, the Court rejected her motion. The decision was appealed, but the High Court upheld it on 30 March 2007. On 27 June 2007, however, ruling on an appeal filed by the defendant, the Supreme Court ordered that the cases be consolidated.

21. The source states that on 16 July 2008 the High Court of the Judicial District of Cartagena sentenced Ms. Rivero to 90 months' imprisonment for perverting the course of justice. On 4 February 2009 the sentence was reduced by the Supreme Court to 84 months' imprisonment.

Consolidation and serving of sentences

22. The source reports that on 29 September 2009 the Executive Oversight and Security Measures Court of Cartagena consolidated the two sentences into a single sentence of 112 months' imprisonment. That decision was partially appealed by Ms. Rivero on the grounds that the duration of the consolidated sentence had been calculated wrongly and that the consolidation of the sentences should have resulted in her being released.

23. On 20 October 2009, the Executive Oversight Court granted Ms. Rivero provisional release for a probationary period of 2 years, 8 months and 27 days on condition that she signed a declaration of commitment and a pledge to make a bail payment.

24. However, the source reports that on 12 December 2012 the Executive Oversight Court's decision of 29 September 2009 was overturned by the High Court of the Judicial District of Cartagena, which ruled that the sentences handed down could not be consolidated. The source argued that the decision issued in response to the partial appeal filed by Ms. Rivero constituted a violation of the procedural principle of *non reformatio in peius*, as it had made her situation worse than it had been under the appealed judgment.

25. According to the information received, the Executive Oversight and Security Measures Court of Cartagena did not notify Ms. Rivero of the decision of 12 December 2012 until 5 November 2014. The source reports that Ms. Rivero subsequently signed a declaration of commitment and has remained under house arrest ever since.

26. The source reported that Ms. Rivero filed an application for review or, in the alternative, appeal, challenging the decision. The Executive Oversight Court did not respond to this appeal. On 16 December 2014, she insisted that the appeal be heard by the Court and, on 13 February 2015, the Court refused to reverse the decision but did admit the appeal.

27. Additionally, Ms. Rivero requested that the sentence be nullified on the grounds that, when the court had issued the decision of 12 December 2012, the period of prescription for the enforcement of criminal penalties had expired. The Court rejected her application. That decision was appealed on 19 May 2015, and the appeal was rejected on 27 August 2015.

28. Faced with the lack of response to her appeal against the decision of 12 December 2012, and the non-response to her application for prescription of the enforcement of penalties, Ms. Rivero sought a remedy of *tutela*. It was argued that the Court's decision ignored the constitutional precedents that clearly establish that judges must never disregard the principle of *non reformatio in peius*.

29. At this stage of the proceedings, the Specialized Ombudsman for Constitutional Matters of the Ombudsman's Office appealed to the Supreme Court in support of Ms. Rivero, arguing that the principles of consolidation and *non reformatio in peius* had been

disregarded. The Specialized Ombudsman further stated that there was evidence indicating that Ms. Rivero was in a fragile state of health and that she therefore required effective protection to ensure that her fundamental right to a decent life was not infringed.

30. However, the source reports that, on 4 March 2015, the Supreme Court rejected Ms. Rivero's claims on the grounds that a *tutela* remedy was not an appropriate means of protecting her rights.

Categories I, II and III of the Working Group on Arbitrary Detention

31. According to the source, Ms. Rivero's detention is arbitrary under category I of the Working Group's methods of work as it lacks any legal basis, having been subject to a five-year period of prescription under article 89 of Act No. 599 of 2000, as amended by article 99 of Act No. 1709 of 2014. The source's argument is based on the fact that the conviction became enforceable at second instance on 4 February 2009, which means that by 5 November 2014 the five-year prescriptive period had already elapsed.

32. The source also contends that, in accordance with the Group's methods of work, the detention is arbitrary under category II, as it resulted from Ms. Rivero's exercise of the right to freedom of opinion and expression through her judicial decisions.

33. Lastly, in the communication, the source refers to category III of the methods of work, arguing that the rules concerning due process have been violated because Ms. Rivero was not provided with an effective judicial remedy for the violation of the procedural principle of *non reformatio in peius* and because her right to a fair trial by an impartial judge was violated.

34. With regard to the impartiality of the judge, the source notes that the judge involved in the cases considered for consolidation also intervened in the judgment handed down on 12 December 2012, calling for Ms. Rivero to be convicted, despite the fact that Ms. Rivero's defence lawyer had filed a motion for disqualification or recusal on the grounds that the judge had participated in the ruling on the earlier cases brought against Ms. Rivero. The case had therefore been heard by a judge who had preconceptions about the matter before him.

Response from the Government

35. On 25 June 2014, the Working Group sent all the information received from the source to the Government. The Working Group requested that the Government provide a detailed response to that communication by 28 July 2017. The Working Group regrets that the Government neither responded within the 60-day period nor asked for the period to be extended.

Discussion

36. In the absence of a response from the Government, the Working Group has decided to render the present opinion in conformity with paragraph 15 of its methods of work.

37. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof shall rest upon the Government if it wishes to refute the allegations made by the petitioners.[1] In the present case, the Government has chosen not to rebut the prima facie credible allegations submitted by the source.

38. The Working Group is persuaded that Ms. Rivero was brought to trial on at least three occasions as a form of punishment for judicial decisions that she had issued, in which she ruled in accordance with the *pro persona* principle and applied the relevant international law with a view to giving effect to the remedy of habeas corpus, in line with the case law of the Constitutional Court but in conflict with the approach of the Supreme Court.

[1] See A/HRC/19/57, para. 68.

39. The Working Group wishes to point out that article 14 (1) of the International Covenant on Civil and Political Rights establishes that, without exception, the judiciary is required to be independent and impartial. States are required to protect judges from conflicts of interest and from intimidation[2] by the executive branch, the legislature and political factions within the judiciary.

40. Judges may be dismissed only "on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law".[3] Furthermore, the Working Group recalls that, under article 11 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders): "Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics." [4]

41. States are bound not to engage in any inappropriate or unwarranted interference in judicial processes, which does not mean that judicial decisions may not be subject to review, nor that sentences handed down may not be mitigated or commuted, as set out in the Basic Principles on the Independence of the Judiciary.[5]

42. In the present case, the Working Group has been persuaded that Ms. Rivero was brought to trial on three occasions, and consequently dismissed from office, for having applied the jurisprudence of the Constitutional Court, which is consistent with international law, and not that of the Supreme Court. In using her judicial position to promote and uphold human rights, Ms. Rivero is protected by the Declaration on Human Rights Defenders, and the judgments issued against her entailing a custodial sentence amount to arbitrary detention under category II of the Working Group's methods of work.

43. The Working Group emphasizes that the independence of the judiciary is essential for the effective protection of human rights in accordance with the norms and standards established under international law. Judges occupy a key position in that the intrinsic nature of their work puts them in a position either to uphold or to contravene the international obligations that States assume when they ratify human rights treaties. Under international law, States must protect the independence of the judiciary, which means, inter alia, that they must refrain from punishing judges who act in accordance with international human rights law. In the present case, Ms. Rivero, as a State official, performed her judicial role in a manner that was in line with the international obligations of Colombia and the guidance of the Constitutional Court.

44. The Working Group is also persuaded that, on 20 October 2009, Ms. Rivero was granted provisional release for 2 years and 21 days on condition that she signed a declaration of commitment and a pledge to make a bail payment. On 12 December 2009, however, the High Court of the Judicial District of Cartagena overturned the decision of 29 September 2009 to consolidate Ms. Rivero's two sentences. Ms. Rivero has been under house arrest since 5 November 2014.

45. Since rendering its deliberation No. 1 in 1993, the Working Group has stated that it shall decide, on a case-by-case basis, whether detention in the form of house arrest has an arbitrary character.[6] Since that time, house arrest has been equated with deprivation of liberty, inasmuch as the person concerned is in closed premises and is not allowed to leave

[2] CCPR/C/GC/32, para. 19.

[3] CCPR/C/GC/32, para. 20.

[4] A/RES/53/144.

[5] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, from 26 August to 6 September 1985, and endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[6] Deliberation No. 1 on house arrest. Report of the Working Group on Arbitrary Detention submitted to the Commission on Human Rights (E/CN.4/1993/24, 12 January 1993).

those premises. In the view of the Working Group, house arrest is a form of deprivation of personal liberty to which consent has not been given.[7]

46. It is important to note that Ms. Rivero had appealed to the above-mentioned High Court in order to seek a correction of the miscalculation of the sentences handed down in the two judgments, which had been consolidated by the Executive Oversight and Security Measures Court.

47. The Working Group notes that the decision of the High Court of the District of Cartagena violated the legal principle of *non reformatio in peius*, as Ms. Rivero had appealed to the High Court to address the above-mentioned miscalculation and not to review the actions of the lower court to her detriment. The Ombudsman affirmed before the Supreme Court that the above-mentioned principles regarding consolidation and *non reformatio in peius* had been violated. On 4 March 2015, the Supreme Court refused to grant judicial protection to Ms. Rivero on the grounds that a remedy of *tutela* was inappropriate.

48. The approach taken by the Colombian authorities violated Ms. Rivero's right to have recourse to an appropriate and effective higher court to petition for a review of the sentence imposed on her.[8] The judgment establishing the final penalty was issued in violation of the rights enshrined in article 14 of the Covenant. Therefore, the deprivation of her liberty on the basis of that judgment constitutes arbitrary detention under category III of the Working Group's methods of work.

49. In the light of the above, the Working Group considers Ms. Rivero's detention to be in violation of articles 8, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 2, 9, 14 and 19 of the International Covenant on Civil and Political Rights, as her rights to freedom of expression and opinion were violated and due process, the impartiality of judges and access to an effective legal remedy were not guaranteed. The detention of Ms. Rivero is therefore arbitrary under categories II and III of the Working Group's methods of work.

50. In the light of the allegations made by the source concerning interference with the independence of the judiciary and the role of judges as potential human rights defenders, the Working Group has decided to refer the information to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders for their consideration and possible action.

Disposition

51. In the light of the foregoing, the Working Group renders the following opinion:

> The detention of Ms. Rivero is arbitrary under categories II and III of the Working Group's methods of work in that it violates articles 8, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 2, 9, 14 and 19 of the International Covenant on Civil and Political Rights, to which the State is a party.

52. The Working Group requests the Government of Colombia to take the steps necessary to remedy the situation of Ms. Beatriz del Rosario Rivero Martínez without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

53. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Beatriz del Rosario Rivero Martínez immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law.

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[7] United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37).

[8] Enshrined in article 14 (5) of the International Covenant on Civil and Political Rights.

54. The Working Group transmits the present opinion to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders for their consideration and possible action.

Follow-up procedure

55. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including on:

(a) Whether Ms. Beatriz del Rosario Rivero Martínez has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. Beatriz del Rosario Rivero Martínez;

(c) Whether an investigation has been conducted into the violation of the rights of Ms. Beatriz del Rosario Rivero Martínez and, if so, what the outcome of the investigation was;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

56. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

57. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to keep the Human Rights Council informed of the progress made in implementing its recommendations, as well as of any failure to take action.

58. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[9]

[*Adopted on 21 November 2017*]

[9] See Human Rights Council resolution 24/7, paras. 3 and 7.